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Ngu Leh Ngiik & Anor v Lee Yiu Ping & Ors

B COURT OF APPEAL (KUCHING) — CIVIL APPEAL NO Q-02(NCVC)(A)-246–02 OF 2017
TENGKU MAIMUN, YAACOB MD SAM AND ZABARIAH YUSOF JJCA
29 NOVEMBER 2018

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Land Law — Subdivision — Co-ownership — Whether s 129(3) of the Sarawak Land Code gave High Court power to order partition of land on application of any registered owner despite objection from other co-owners

D The appellants and the respondents, who were all related to each other, held different shares as co-proprietors of a piece of land. For many years, the first and second appellants and the first respondent had their own buildings on the land. Sometime in 2013, the second respondent engaged a licensed surveyor to prepare a plan to subdivide the land into two plots in accordance with the E respective shareholdings of the parties. The plan ('A1') prepared by the surveyor divided the land into two plots, one covering an area of 4,827.31 sqmt and the other, an area of 12,611 sqmt. The plan also provided for, among others, roads, reserves, access-ways and drainage. All the co-proprietors signed their consent to A1 before it was submitted to the Land and Survey Department of Sibu F which approved the plan. Despite having consented to A1 earlier, the appellants refused to go through with the subdivision and drew up their own plan for subdivision ('NLN1'). The respondents applied to the High Court ('the OS') for an order that the land be partitioned on the basis of A1 pursuant to s 129 of the Sarawak Land Code ('the Land Code'). The appellants opposed G the OS on the grounds that, inter alia: (a) they were deceived into signing A1; (b) A1 reduced their shareholdings in the land; (c) their consent as co-proprietors of the land was required in order to allow the OS; and (d) A1 did not provide a right of way for the second appellant to access his building from the main road. The High Court granted the OS and held that: (i) A1 was in H accordance with the shareholdings of the parties and it was the only way the land could be subdivided; (ii) the consent of the appellants was not required; and (iii) NLN1 could not be executed because it did not fulfill the statutory requirement that there should be a minimum of one acre for agricultural land. In their instant appeal against the High Court's decision, the appellants I contended that the High Court had no power to order the partition of the land according to A1 in spite of their objection to it and that in doing so the court had ignored their indefeasible rights and interests in the land.

Held, unanimously dismissing the appeal:

(1) Section 129 of the Land Code was very clear in its purport and intent. It gave two options to an applicant to partition land, ie, either by mutual consent under the first limb or by order of the court under the second limb. Given the clear wordings of s 129, the High Court judge committed no appealable error in concluding that from a literal reading of s 129(3), if the consent of all co-proprietors could not be obtained, then any one of them was entitled to apply to the court for an order for partition (see para 20).

(2) The High Court judge had the power to grant the order for partition under the second limb of s 129(3). Whether or not the co-proprietors had given their consent or whether or not the approved plan represented the wishes of the appellants were no longer relevant as the court was exercising its power to order the partition independent of the consent, which power was found not only under s 129(3) of the Land Code but also under item 3 of the Schedule to the Courts of Judicature Act 1964 (see para 21).

(3) On the question of whether it was fair and just to order partition based on A1, it had to be borne in mind that the respondents' plan was drawn up by a qualified surveyor and approved by the Land and Survey Department of Sibu. On the other hand, the appellants' plan for subdivision was never certified by any qualified surveyor nor was it approved by the Land and Survey Department. The appellants' plan thus did not comply with Part X and s 231(1) of the Land Code (see para 26).

(4) The High Court found that A1 was prepared in accordance with the parties' shareholdings in the land, ie, the total area for the appellants was 4,827.31 sqmt (about 28%) while the respondents had 12,611 sqmt (about 72%), after excluding an area for a tower base site. This accorded with the appellants' total shareholding of 69/240 (about 28%) and the respondents' total shareholding of 171/240 (about 72%). Hence, the appellants' contention that partitioning the land according to A1 would reduce their shareholding had no merit. There was no credible evidence to support that contention (see paras 27–28).

(5) Partitioning the land based on A1 did not affect the appellants' indefeasible rights and interests in the land, nor their reserved right of way as A1 showed that there was, in fact, an existing road connecting both the subdivided plots to the road (see paras 29–30).

[Bahasa Malaysia summary

Perayu dan responden, yang semuanya mempunyai hubungan dengan satu sama lain, memegang saham berbeza sebagai pemilik bersama sebidang tanah. Selama bertahun-tahun, perayu pertama dan kedua dan responden pertama mempunyai bangunan sendiri di atas tanah. Pada tahun 2013, responden kedua mendapatkan seorang juruukur berdaftar untuk menyediakan pelan

untuk membahagikan tanah tersebut kepada dua bidang mengikut pemegangan saham masing-masing. Pelan ('A1') yang disediakan oleh juruukur membahagikan tanah tersebut menjadi dua bidang, satu meliputi kawasan seluas 4,827.31 meter persegi dan satu lagi, seluas 12,611 meter persegi. Pelan tersebut juga menyediakan jalan, rizab, jalan masuk dan saliran. Semua pemilik bersama menandatangani persetujuan mereka kepada A1 sebelum diserahkan kepada Jabatan Tanah dan Ukur Sibu yang meluluskan pelan tersebut. Walaupun telah bersetuju dengan A1 pada mulanya, perayu enggan meneruskan pembahagian dan membuat rancangan sendiri untuk pembahagian ('NLN1'). Responden memohon kepada Mahkamah Tinggi ('OS') untuk perintah bahawa tanah tersebut akan dibahagikan berdasarkan A1 menurut s 129 Kanun Tanah Sarawak ('Kanun Tanah'). Perayu menentang OS dengan alasan bahawa, antara lain: (a) mereka ditipu untuk menandatangani A1; (b) A1 mengurangkan pegangan saham mereka di tanah; (c) persetujuan mereka sebagai pemilik bersama tanah diperlukan untuk membenarkan OS; dan (d) A1 tidak memberikan hak kepada perayu kedua untuk mengakses bangunannya dari jalan utama. Mahkamah Tinggi membenarkan OS dan memutuskan bahawa: (i) A1 adalah selaras dengan pemegangan saham pihak-pihak dan ia adalah satu-satunya cara tanah tersebut boleh dibahagikan; (ii) persetujuan perayu tidak diperlukan; (iii) NLN1 tidak boleh dilaksanakan kerana ia tidak memenuhi keperluan statutori yang harus ada minimum satu ekar untuk tanah pertanian. Dalam rayuan mereka ini terhadap keputusan Mahkamah Tinggi, perayu berpendapat bahawa Mahkamah Tinggi tidak mempunyai kuasa untuk memerintahkan pembahagian tanah mengikut A1 walaupun bantahan terhadapnya dan bahawa dengan berbuat demikian Mahkamah telah mengabaikan hak-hak tidak boleh sangkal mereka dan kepentingan dalam tanah.

Diputuskan, sebulat suara menolak rayuan:

(1) Seksyen 129 Kanun Tanah adalah sangat jelas dalam maksud dan niatnya. Ia memberi dua pilihan kepada pemohon untuk pembahagian tanah, iaitu sama ada dengan persetujuan bersama di bawah cabang pertama atau dengan perintah mahkamah di bawah cabang kedua. Memandangkan kata-kata yang jelas dari s 129, hakim Mahkamah Tinggi tidak melakukan kesilapan yang boleh dirayu dalam menyimpulkan bahawa dari bacaan nyata s 129(3), jika persetujuan semua pemilik bersama tidak dapat diperoleh, maka mana-mana satu daripadanya berhak untuk memohon kepada mahkamah untuk satu perintah bagi pembahagian (lihat perenggan 20).

(2) Hakim Mahkamah Tinggi mempunyai kuasa untuk memberikan perintah untuk pembahagian di bawah cabang kedua s 129(3). Sama ada atau tidak pemilik bersama telah memberikan persetujuan mereka atau sama ada atau tidak pelan yang diluluskan mewakili kehendak perayu tidak lagi relevan kerana mahkamah telah menjalankan kuasanya untuk

memerintahkan pembahagian bebas daripada persetujuan tersebut, yang mana kuasa ditemui bukan sahaja di bawah s 129(3) Kanun Tanah tetapi juga di bawah perkara 3 Jadual Akta Mahkamah Kehakiman 1964 (lihat perenggan 21).

(3) Mengenai persoalan sama ada adil dan saksama untuk memerintah pembahagian berdasarkan A1, perlu diingat bahawa pelan responden telah disediakan oleh juruukur yang berkelayakan dan diluluskan oleh Jabatan Tanah dan Ukur Sibu. Sebaliknya, rancangan perayu untuk pembahagian tidak pernah disahkan oleh mana-mana juruukur yang berkelayakan dan tidak diluluskan oleh Jabatan Tanah dan Ukur. Pelan perayu tersebut tidak mematuhi Bahagian X dan s 231(1) Kanun Tanah (lihat perenggan 26).

(4) Mahkamah Tinggi mendapati bahawa A1 telah disediakan mengikut pemegangan saham pihak-pihak dalam tanah, iaitu, jumlah kawasan perayu adalah 4,827.31 meter persegi (sekitar 28%) sementara responden memiliki 12,611 meter persegi (sekitar 72%), selepas tidak termasuk kawasan tapak menara. Ini mengikut jumlah pegangan saham perayu sebanyak 69/240 (sekitar 28%) dan jumlah pegangan saham responden sebanyak 171/240 (sekitar 72%). Oleh itu, pertikaian perayu bahawa pembahagian tanah mengikut A1 akan mengurangkan pegangan saham mereka tidak mempunyai merit. Tiada keterangan yang boleh dipercayai untuk menyokong pertikaian tersebut (lihat perenggan 27–28).

(5) Pembahagian tanah berdasarkan A1 tidak menjejaskan hak dan kepentingan tidak boleh sangkal perayu di tanah tersebut, atau hak mereka yang terpelihara kerana A1 menunjukkan bahawa sebenarnya ada jalan yang menghubungkan kedua-dua plot yang dibahagikan ke jalan (lihat perenggan 29–30).]

Notes

For a case on co-ownership, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) para 5714.

Cases referred to

EG v EG [2012] IEHC 292, HC (refd)

GP De Silva & Ors v Chua Yam Thong [1962] 1 MLJ 236 (refd)

KM S Kumarappan Chettiar @ KM S Kumarappa Chettiar v S Ramasamy a/l KM S Chockalingam [2000] MLJU 464, HC (refd)

Ku Yan bte Ku Abdullah v Ku Idris bin Ku Ahmad & Ors [1991] 3 MLJ 439, HC (refd)

Positive Vision Labuan Ltd v Ketua Pengarah Hasil Dalam Negeri and other appeals [2017] 2 MLJ 421, FC (refd)

A *Tan Kok Chiang v Tan Yaw Ti and Anor* [2009] MLJU 0606; [2009] 1 LNS 711, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 Schedule, item 3
B Land Code (Cap 81) ss 129, 129(1), (3), 132(1), 231(1), Part X

Appeal from: Originating Summons No SBW-24NCVC-11/9 of 2015 (High Court, Sibu)

C *Henry Ling Kuong Meng (Ling & Wong) for the appellants.*
Clement Wong (Then Siaw Lian with him) (King Wei & Clement) for the respondents.

Tengku Maimun JCA (delivering judgment of the court):

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INTRODUCTION

[1] This was an appeal by the appellants/defendants against the decision of the High Court in allowing the respondents'/plaintiffs' originating summons ('OS') for an order that the land containing an area of more or less 1.74420 hectares, described as Sibu Occupation Ticket No 35735 ('the land') be partitioned under s 129 of the Sarawak Land Code ('the Land Code'). For the reasons that follow, we had unanimously dismissed the appeal.

F BACKGROUND FACTS

[2] The appellants and the respondents are the registered co-proprietors of the land, holding the following shareholdings:

G (a) the first appellant 57/240 shares;

(b) the second appellant 12/240 shares;

(c) the first respondent 57/240 shares;

H (d) the second respondent 38/240 shares;

(e) the third respondent 38/240 shares; and

(f) the fourth respondent 38/240 shares.

I **[3]** The parties are related to one another. The second appellant and the second to the fourth respondents are cousins and the first and the second appellants are mother and son, whereas the first respondent is the uncle to the second appellant.

[4] The appellants and the respondents had been using the land for decades. About 23 years ago, the first appellant constructed a brick wall house cum workshop while the second appellant had constructed an office cum workshop on the land. Similarly, about 20 years ago, the first respondent, with the consent of the other respondents, constructed a bungalow on the land. At all material time, neither party had objected to the usage of the land or to the location of the building/houses on the land.

[5] On or about early 2013, the second respondent engaged a qualified licensed surveyor by the name of Wong Goh Ann to prepare a plan for the subdivision of the land into two plots/lots of land in accordance with the appellants' and the respondents' respective shareholdings.

[6] The surveyor prepared a plan (exh A1) for the subdivision, whereby the land is divided into plot 1 and plot 2. Plot 1 consists of an area of 4,827.31 sqmt while plot 2 consists of 12,611.00 sqmt. There is an area of approximately 3.69 sqmt reserved for SESCO for the purpose of a tower base site. In his plan exh A1, the surveyor labelled the first appellant's and the second appellant's house cum workshop and office cum workshop respectively, as plot 1 whilst the first respondent's bungalow was labelled as plot 2.

[7] The plan exh A1 also showed all existing roads, reserves and access-ways, the proposed roads, drains and location of drainage outlet and their alignments and dimensions and such other details as may be required by the state planning authority.

[8] Exhibit A1 was signed by all the co-proprietors as evident from exh A3 and it was submitted to the Land and Survey Department, Sibu. The said plan exh A1 was duly approved by the Land and Survey Department, Sibu on 26 September 2013 for purpose of agriculture (hereinafter exh A1 will be referred to as the approved plan). The partition or subdivision could not however go through as the appellants, notwithstanding their earlier consent, objected to it and refused to allow the submission of the partition/subdivision of the land in accordance with the approved plan of subdivision. Hence the respondents' application vide the OS.

PROCEEDINGS IN THE HIGH COURT

[9] Before the learned judge, the appellants tendered their own plan for subdivision marked as exh NLN1 and they opposed the respondents' OS on the following grounds:

(a) that the appellants were deceived into signing exh A3;

(b) that the partition based on the approved plan reduced their shareholdings in the land;

(c) that the consent of the appellants as the registered co-proprietors of the land is important and the absence of any such consent is fatal to the respondents application;

(d) that the approved plan for subdivision no longer represented the wishes of the appellants since they first gave their consent;

(e) that the approved plan no longer provided a right of way for the appellants, in particular for the second appellant to access his own building on the land from the main road; and

(f) that the approved plan reclassified and amalgamated both the appellants' several and undivided shares and interest in the land into one collective lot whereas the appellants wanted individual sub-lots for their own respective shareholdings.

[10] The learned judge considered the relevant principles of law relating to the application for subdivision by considering s 129(1) and (3) of the Land Code. His Lordship found guidance in the cases of *Ku Yan bte Ku Abdullah v Ku Idris bin Ku Ahmad & Ors* [1991] 3 MLJ 439; *Tan Kok Chiang v Tan Yaw Ti and Anor* [2009] MLJU 0606; [2009] 1 LNS 711; *KM S Kumarappan Chettiar @ KM S Kumarappa Chettiar v S Ramasamy a/l KM S Chockalingam* [2000] MLJU 464; *GP De Silva & Ors v Chua Yam Thong* [1962] 1 MLJ 236; and the English case of *EG v EG* [2012] IEHC 292.

[11] Having considered the authorities and the appellants' contentions, the learned judge disagreed with the appellants. In essence His Lordship ruled that consent of the appellants was not required and that the approved plan for partition was in accordance with the parties' shareholdings. The learned judge further ruled that the appellants' plan for partition could not be executed because of the statutory imposition of minimum of one acre for agricultural land and that the appellants' plan contravened this requirement. The learned judge held that the only way partition could be done was for the land to be partitioned into two plots/sublots as per the approved plan.

[12] The OS was consequently allowed by the learned judge and an order in terms thereof was granted. Aggrieved, the appellants appealed to this court.

THE APPEAL

[13] The appellants argued that in allowing the respondents' application, the learned judge erred in the following respects:

(a) in disregarding the intention of s 129 of the Land Code;

(b) in failing to appreciate that the appellants' indefeasible right and interest in the land are undivided, inseverable and absolute; and

(c) in resolving the conflicting allegations in the affidavits summarily.

[14] Learned counsel for the appellants submitted that the decision of the learned judge in ordering the partition of the land is repugnant to s 129(1) and (3) of the Land Code; that by s 129(3), there shall be no partition of the land without the consent of all the co-proprietors and that it was clear from the affidavits that the earlier consent for partition or subdivision was not freely given by the appellants. Learned counsel further submitted that s 129(3) of the Land Code does not allow the court to exercise its discretionary power to order a partition and that the learned judge had erroneously relied on the cases which were wholly irrelevant to the OS.

[15] Learned counsel had also submitted that by s 129(1) and 132(1) of the Land Code, the appellants' undivided rights and interests in the land as the registered co-proprietors, is equally indefeasible against the respondents unless it is otherwise taken away with their free consent.

[16] It was further submitted for the appellants that when they first gave their consent for the partition or subdivision of the land, they gave consent for the partition or subdivision in the manner set out in exh NLN1 and not in the manner set out in exh A1. Given the conflicting allegations as contended by the parties, learned counsel submitted that the learned judge ought to have converted the OS into a writ action.

OUR DECISION

[17] The primary issue for our determination was whether the learned judge erred in holding that consent is not required and is not mandatory under s 129 of the Land Code and whether the learned judge had the power to make an order for partition.

[18] Section 129 of the Land Code provides:

129 Co-proprietorship

(1) Except in the case of land held by trustees, when land is held by co-proprietors they shall be entitled to the land in undivided shares equally, or in such other proportion as may be registered, and, subject as hereinafter provided, any one of them may claim to have a partition of the land made:

Provided that no partition shall be effected except in accordance with Part X and subject to such terms and conditions as may be imposed by the State Planning Authority.

A (2) No such partition of land subject to a charge or sublease shall be made unless the chargee or sublessee, as the case may be, shall in writing delivered to the Registrar have given his consent to such partition.

(3) No such partition of land shall in any case be made unless either the consent of all the co-proprietors has been obtained or the same has been ordered by a competent court.

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[19] Part X of the Land Code laid down the procedure for application for subdivision/partition and s 231(1) of the Land Code provides that the subdivision plan has to be prepared by a qualified person on behalf of the proprietor.

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[20] Section 129 is very clear in its purport and intent, namely that it gives two options to an applicant to partition a land, ie first by mutual consent under the first limb and second by order of the court under the second limb. Given the clear wordings of s 129 of the Land Code, we found no appealable error on the part of the learned judge in concluding that from the literal reading of s 129(3), if the consent of all co-proprietors cannot be obtained, then any one of the co-proprietors is entitled to apply to the competent court, ie the High Court for an order for partition.

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[21] We agreed with the learned judge that he had the power to grant the order for partition under the second limb of s 129(3). Whether or not the co-proprietors gave their consent or whether or not the approved plan represented the wishes of the appellants were no longer relevant as the court was exercising its power to order the partition independent of the consent, which power is found not only under s 129(3) of the Land Code but under item 3 of the Schedule of the Courts of Judicature Act 1964 which reads:

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3 Partition of land

Power to direct a sale instead of partition in any action for partition of land; and in any cause or matter relating to land, where it appears necessary or expedient, to order the land or any part thereof to be sold, and to give all necessary and consequential directions.

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[22] With respect, we were unable to accept the appellants' submission that the phrase 'the same has been ordered by a competent court' in s 129(3) or to be specific the words 'the same' has to be read in reference to the consent of the co-proprietors for the application for partition of the land. In our judgment, the words 'the same' must be read to refer to the 'partition of land'. To hold that the words 'the same' refer to consent of co-proprietors would render the second limb of s 129(3) of the Land Code redundant and otiose as the court could never make an order for partition if co-proprietors did not give their consent. And if the co-proprietors had given their consent, then the need for any of the

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co-proprietors to apply to the court for partition would never arise.

[23] It is trite that legislature would not act in vain and that when the provisions of law are clear and does not admit of any ambiguity, then the provisions must be strictly interpreted (see *Positive Vision Labuan Ltd v Ketua Pengarah Hasil Dalam Negeri and other appeals* [2017] 2 MLJ 421).

[24] We disagreed with learned counsel for the appellants that the learned judge had relied on the cases erroneously. Those cases were useful guidance for the learned judge to come to his decision on the OS. Even if one were to disregard the authorities, we found that the learned judge had correctly decided on the OS based on the clear provision of s 129(3) of the Land Code.

[25] On the appellants' contention that the learned judge ought to have converted the OS into a writ action, we opined that if indeed the appellants had seriously contended that the dispute should be resolved by a writ action, the proper time to raise this point would be during the proceedings at the High Court. The appellants however did not canvass this point in the High Court. We therefore found this point to be a mere afterthought and devoid of any merit.

[26] In any event, the issue before the learned judge was simply whether in view of the appellants' objection, it was fair and just to order for partition based on the approved plan. It must be borne in mind that the respondents' plan was drawn up by a qualified surveyor and it had been approved by the Land and Survey Department, Sibu while the appellants' plan for subdivision was never certified by any qualified surveyor. Neither was the appellants' plan accepted and approved by the Land and Survey Department. The appellants' plan was thus not in compliance with Part X and s 231(1) of the Land Code.

[27] Further, the respondents' plan in exh A1 was prepared by the surveyor based on the parties' respective shareholdings. The appellants' total shareholdings in the land is 69/240 (approximately 28%) whilst the respondents' total shareholdings is 171/240 (approximately 72%). His Lordship found that the computation showed that the partition as per the plan in exh A1 (after excluding the area of 3.69 sqmt for SESCO tower base site), is in accordance with the parties shareholdings, ie that the total area for the appellants is 4,827.31 sqmt which is approximately 28% whereas the total area for the respondents is 12,611 sqmt which is approximately 72%.

[28] In the premises, we agreed with the learned judge that the appellants' contention that the partition based on plan exh A1 reduces their shareholding in the land was without merit, more so when the appellants had not adduced credible evidence to support their contention.

[29] Insofar as the appellants' argument on the point of indefeasibility is concerned, we were of the view that the point raised was misconceived and without merit, as the partition if executed would not affect the appellants' indefeasible right and interest to the land.

[30] The appellants had also complained that the approved plan would affect their reserved right of way. Based on exh A1, we similarly found this complaint to be without merit. Exhibit A1 shows that there is in fact an existing road connecting both plot 1 and plot 2 to the road.

CONCLUSION

[31] We agreed with the learned judge on the evaluation of the facts and the application of the law. Having found no appealable error on the part of the learned judge which warrant our appellate intervention, we unanimously dismissed the appeal.

Appeal dismissed unanimously.

Reported by Ashok Kumar